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IN THE

Supreme Court of the United States

October Term, 1962

NO. 149

JAMES W. HARLOW and CHARLES E. WILSON,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

John W. Wurzbach, Esquire
19th Floor Amicable Building
Waco, Texas

Attorney for Petitioner,
James W. HARLOW

James Chaiken, Esquire
First National Bank Building
San Antonio, Texas

Attorney for Petitioner,
Charles E. WILSON

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PETITION FOR REHEARING

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners present their Petition for Rehearing of this Court's Order dated October 8, 1962 denying their Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and in support thereof respectfully show:

GROUNDS FOR REHEARING

I.

In the absence of Petitioners the Trial Court heard extensive testimony in the form of secondary evidence of "probable cause" for the issuance of a search and seizure warrant, and in connection with the illegal interception by investigators of Petitioner Wilson's mail.[1]

II.

The record does not reflect that there were any objections by counsel or by Petitioners themselves to the taking of this testimony in Petitioners' absence. Indeed, no specification of error was addressed to the United States Court of Appeals for the Fifth Circuit on this point, nor was the question raised in the Petition for Certiorari. The record likewise does not reflect any stipulation or waiver on the part of Petitioners. We are aware of *Parker v. United States*, 184 F. 2d 488 (4th. Cir., 1950); however, in this case, when the defendant returned to the courtroom, he was furnished with a transcript

[1]The record inter alia reflects: "(THE FOLLOWING IN CHAMBERS OUT OF THE HEARING OF THE JURY, BUT WITH COUNSEL PRESENT.) . . . CARL A. TURMO, called as a witness on behalf of plaintiff, being of lawful age, and having previously been duly sworn, testified as follows: . . ." (R. 538-570). Also, "(THE FOLLOWING IN CHAMBERS, WITH COUNSEL PRESENT, BUT OUT OF THE HEARING OF THE JURY) . . . DONALD L. COLEMAN, called as a witness on behalf of the plaintiff, being of lawful age, and having previously been duly sworn, testified as follows: . . ." (R. 599-608). Also, "THE FOLLOWING IN CHAMBERS OUT OF THE HEARING OF THE JURY WITH COUNSEL PRESENT) . . . WILLIAM D. CANFIELD, called as a witness on behalf of plaintiff, being of lawful age and having been previously duly sworn, testified as follows: . . ." (R. 875-888). Also, "SAMUEL E. BRAY, called as a witness on behalf of the defendants, being of lawful age and having previously been duly sworn, testified as follows: . . ." (R. 890-908). The reasonable inference is, of course, that Petitioners were not present, else the record would not specify only the presence of counsel. In any event, the record should affirmatively show the presence of Petitioners. *Lewis v. United States*, 146 U.S. 370, 372, 36 L. Ed. 1011, 1013.

of the testimony of the witnesses who had been examined in his absence, and did not object to their testimony, or examine them further, or take any other action. Aside from this distinction, we believe the *Parker* case conflicts with the First Circuit's holding in *Greenberg v. United States*, 280 F. 2d 472, where it was held error to proceed with testimony in the absence of the defendant, even where apparently defendant's counsel stipulated to a waiver of the defendant's presence. Moreover, this Honorable Court in *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466, has held that the courts indulge every reasonable presumption against waiver of fundamental constitutional rights.[2]

III.

The Sixth Amendment of the *Constitution of the United States* provides that in a criminal prosecution the accused shall have the right "to be confronted with the witnesses against him."

IV.

Rule 43 of the *Federal Rules of Criminal Procedure*, reads as follows:

> "The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules.

[2]Counsel feel professionally obligated to advise the Court that this question did not even occur to counsel for Petitioners until the receipt by Petitioner Harlow's counsel of a letter dated July 27, 1962, referring to the observation in briefs about extensive testimony being taken in chambers and inquiring if this was error in Petitioner's absence. Upon receipt of this letter Petitioner Harlow's counsel communicated with all of the counsel who had participated in the trial of the case in order to ascertain whether any of them had any independent recollection of events surrounding the sessions in chambers. However, Petitioners do not have the burden of showing prejudice. *Jones v. United States*, 299 F. 2d 661, 662 (10 Cir., 1962).

In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35."

CONCLUSION

For the foregoing reasons it is respectfully urged that this Petition for Rehearing be granted, and that, upon further consideration, Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JOEL W. WESTBROOK, ESQUIRE
12th Floor Amicable Building
Waco, Texas

Attorney for Petitioner,
JAMES W. HARLOW

JAMES GILLESPIE, ESQUIRE
Frost National Bank Building
San Antonio, Texas

Attorney for Petitioner,
CHARLES E. WILSON

CERTIFICATE OF COUNSEL

I, Joel W. Westbrook, counsel for the Petitioner Harlow do hereby certify the foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, Subdivision 2, of the Rules of this Court.

JOEL W. WESTBROOK
Counsel for Petitioner Harlow

PROOF OF SERVICE

I, Joel W. Westbrook, attorney for Petitioner Harlow herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day of , 1962, I served copies of the foregoing Petition for Rehearing on the United States by mailing them in duly addressed envelopes, air mail, postage prepaid, to: Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington, D. C.; Honorable Beatrice Rosenberg, Attorney, Department of Justice, Washington 25, D. C.; Honorable William Paisley, Attorney, Department of Justice, Washington 25, D. C.; Honorable Ernest Morgan, United States District Attorney for the Western District of Texas, Federal Building, San Antonio, Texas.

JOEL W. WESTBROOK
12th Floor Amicable Building
Waco, Texas